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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

JERZY GRANADOS GUTIERREZ,

Defendant and Appellant.

B207144

(Los Angeles County
Superior Ct. No. BA324298)

APPEAL from a judgment of the Superior Court of Los Angeles County. Sam Ohta, Judge. Affirmed with direction.

Jennifer Peabody, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Steven D. Matthews and David E. Madeo, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Appellant Jerzy Gutierrez appeals from the judgment entered following a jury trial in which he was convicted of three counts of second degree robbery, three counts of false imprisonment by force or violence, and one count of assault with a firearm. The jury also found appellant used a gun in the commission of the robberies and aggravated assault. Appellant contends instructing with CALCRIM No. 226 violated his constitutional rights by impermissibly singling out and undermining his testimony. We affirm, but direct the trial court to amend the abstract of judgment.

FACTS

On July 20, 2006, appellant approached Cesar Aguilar at Evolution Recycling Center where Aguilar worked, pointed a semi-automatic handgun at Aguilar, and robbed him of cash, a pendant, and a mobile phone.¹

On August 24, appellant approached Apolonio Villareal, Alejandro Andrade, and Roberto Hernandez Murillo² at E & M Recycling Center (E & M). Appellant pointed a gun at them, ordered them to lie on the ground, and threatened to shoot anyone who moved. Appellant ordered Villareal to walk to the cashier's booth, where Villareal handed appellant \$850. Appellant also demanded Villareal's backpack, which contained additional cash, and Andrade's mobile phone. Before he left, appellant warned the three men he was not alone and told them to lie on the ground for 10 minutes. Los Angeles Police Department detectives, who were watching the recycling business because of a recent rash of robberies at nearby recycling centers, observed appellant's conduct and arrested him.

¹ Unless otherwise noted, all subsequent date references pertain to 2006.

² The Information and verdict forms referred to Murillo as Hernandez.

Appellant admitted in his testimony that on August 24 he showed the cashier at E & M a gun and took cash from him. Appellant testified he was acting on orders from two City Terrace gang members who threatened to harm him and his family if he did not take the money and backpack from the E & M employees. City Terrace gang members had previously beaten and shot appellant. Appellant denied committing the three other charged robberies.³

The jury convicted appellant of the second degree robbery of Villareal, Andrade, and Aguilar; false imprisonment of Villareal, Andrade, and Hernandez Murillo by force or violence; and assault on Hernandez Murillo with a firearm. The jury also found appellant personally used a gun in the commission of the robberies (Pen. Code, § 12022.53, subd. (b))⁴ and aggravated assault (§ 12022.5, subd. (a)). The jury acquitted appellant of the two remaining robbery charges. The court sentenced appellant to 21 years and 8 months in prison.

DISCUSSION

1. CALCRIM No. 226

The trial court instructed the jury with CALCRIM No. 226, which informed jurors that they were to determine the credibility of witnesses and suggested some factors the jurors could consider. In pertinent part, the instruction provided as follows: “You alone must judge the credibility or believability of the witnesses. In deciding whether testimony is true and accurate, use your common sense and experience. The testimony of each witness must be judged by the same standard. You must set aside any bias or

³ We do not set forth the evidence pertaining to the robbery of Cesar and Laura Flores, of which appellant was acquitted.

⁴ Unless otherwise noted, all subsequent statutory references pertain to the Penal Code.

prejudice you may have, including based on the witness's gender, race, religion, or national origin. You may believe all, part, or none of any witness's testimony. Consider the testimony of each witness and decide how much of it you believe. [¶] In evaluating a witness's testimony, you may consider anything that reasonably tends to prove or disprove the truth or accuracy of that testimony. Among the factors that you may consider are: [¶] How well could the witness see, hear, or otherwise perceive the things about which the witness testified? [¶] How well was the witness able to remember and describe what happened? [¶] What was the witness's behavior while testifying? [¶] Did the witness understand the questions and answer them directly? [¶] Was the witness's testimony influenced by a factor such as bias or prejudice, a personal relationship with someone involved in the case, or a personal interest in how the case is decided? [¶] What was the witness's attitude about the case or about testifying? [¶] Did the witness make a statement in the past that is consistent or inconsistent with his or her testimony? [¶] How reasonable is the testimony when you consider all the other evidence in the case? [¶] Did other evidence prove or disprove any fact about which the witness testified? ...”

Appellant contends the portion of the instruction referring to the influence of “a factor such as bias or prejudice, a personal relationship with someone involved in the case, or a personal interest in how the case is decided” violated due process and equal protection because it “impermissibly and exclusively focused on and singled-out appellant, because he was the only defense witness and presumably, the only witness who had any personal interest in the outcome of the case.”

Respondent contends appellant forfeited his claims by failing to object to the instruction at trial. However, even without objection at trial, section 1259 permits appellate review of a jury instruction that affected the appellant's substantial rights. Determining whether appellant's substantial rights were affected requires consideration of the merits of the issue. (*People v. Kainzrants* (1996) 45 Cal.App.4th 1068, 1074;

People v. Andersen (1994) 26 Cal.App.4th 1241, 1249.) Accordingly, we must review the merits of appellant's claims.

Purportedly erroneous instructions are reviewed in the context of the entire charge to determine whether it is reasonably likely the jury misconstrued or misapplied the challenged instruction. (*People v. Dunkle* (2005) 36 Cal.4th 861, 899; *People v. Frye* (1998) 18 Cal.4th 894, 957.)

CALCRIM No. 226 expressly applied to all witnesses and required jurors to apply the same standards to assess the credibility of every witness. The challenged portion was also phrased to apply uniformly to all witnesses. It did not "single out" appellant or defense witnesses. It neither required jurors to consider a witness's interest in the case nor suggested that such an interest detracted from the witness's credibility. It is permissible for the jury to consider a defendant's interest in the outcome of the case when evaluating the defendant's testimony, and it is permissible for the court to instruct the jury that it may do so, provided the instruction is "stated in general terms and the jury should be left without suggestion of its application to any particular witness." (*People v. Brown* (1943) 22 Cal.2d 752, 757-758.)

In *People v. Allison* (1989) 48 Cal.3d 879, the Supreme Court rejected a comparable contention regarding an instruction that "[a] witness willfully false in one material part of his testimony is to be distrusted in others." (CALJIC No. 2.21) The defendant argued the jury would conclude the instruction was directed primarily at his own exculpatory testimony. The Supreme Court noted that " '[n]othing in the language of the instruction itself improperly singled out [defendant.] By its terms, the instruction referred only to a "witness" and not to anyone by name or legal status. The jury was also instructed that "every person" who testified under oath is a witness (CALJIC No. 2.20), and that no statement by the court was intended to suggest that the jury should believe or disbelieve "any" witness (CALJIC No. 17.30).' " (*Id.* at p. 895.) The Supreme Court further noted that, to the extent the instruction focused on the weaknesses in the defendant's testimony, " 'the instruction properly did its job.' " (*Id.* at p. 896, fn. 7.) A

defendant's testimony is not entitled to preferential treatment or a "false aura of veracity." (*Ibid.*)

Accordingly, we reject appellant's contention. CALCRIM No. 226 properly informed the jury, in a neutral fashion, that it was permitted to consider any witness's bias, interest, or prejudice, along with numerous other factors, in assessing the credibility of the witness's testimony. Appellant was not entitled to removal of this factor from the instruction simply because he testified. Moreover, the possibility that a witness's testimony may be influenced by his or her interest in the outcome of a case is a matter of common sense. Accordingly, had the challenged factor been removed, jurors would nonetheless have been able -- and highly likely -- to consider appellant's interest in avoiding conviction when assessing his credibility. Inclusion of the challenged factor did not render appellant's trial fundamentally unfair. (*People v. Falsetta* (1999) 21 Cal.4th 903, 913.) Nor has appellant demonstrated unequal treatment of persons who are similarly situated, as required to establish an equal protection violation. (*People v. Wilkinson* (2004) 33 Cal.4th 821, 836.) Indeed, the instruction expressly directed the jury to apply the same standards to all witnesses. Equal protection does not require equal applicability of every factor listed in the instruction to every witness.

2. Abstract of judgment

Appellant requests that we order the trial court to modify the abstract of judgment to reflect that his convictions resulted from a jury trial, not a guilty plea, and that the statutory authority for the firearm enhancement in count 3 was section 12022.5, subdivision (a), not section 12022.53, subdivision (a). Respondent concedes the requested changes are required. We therefore direct the trial court to issue an amended abstract.

DISPOSITION

The judgment is affirmed. The trial court is directed to issue an amended abstract of judgment stating that appellant's convictions resulted from a jury trial, not a guilty plea, and that the authority for the enhancement in count 3 was section 12022.5, subdivision (a).

NOT TO BE PUBLISHED.

BAUER, J.*

We concur:

MALLANO, P. J.

ROTHSCHILD, J.

*Judge of the Orange County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.